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No. 169

In the Supreme Court of the United States

OCTOBER TERM, 1951

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

KAKU NAGANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this Reply Brief we shall deal only with two aspects of Respondent's Brief which, we think, most clearly reflect misunderstanding of the Trading With the Enemy Act and the executive orders issued thereunder.

First, respondent concedes that a "national of a designated enemy country" may not recover under Section 9 (a) (Brief, pp. 11, 16–17, 34). And if the language of Executive Order 9193 has any meaning, it is clear that respondent is a "national" in that sense. She was "within"

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Japan and she is a citizen of Japan. Respondent assumes that "within" in Executive Order 9193 is identical in meaning with "resident within" in Section 2 (Brief, p. 17). We find no warrant for thus writing a word into the Executive Order. The applicable definition of "national" in Executive Order 8389, which the definition of Executive Order 9193 modifies, uses both "domiciled" and "resident"; a "national" is defined as "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country." Unless the word "within"—which appears three times in Executive Order 9193—was used in the sense of physical location, as distinguished from the ties sometimes denoted by "domiciled" or "resident," it is difficult to see why it was used at all.

If respondent is a "national of a designated enemy country" the result in this case will be the same whether it is held that recovery by such a "national" is barred by Section 39 or that as such a national she is an "enemy" within the broadened definition of that term. See, *Clark* v. *Uebersee Finanz-Korp., A. G.,* 332 U. S. 480, 486–488, and Petitioner's Brief, pp. 53–54.

On the admitted facts the Custodian made no mistake in finding that "Kaku Nagano, whose last known address is Tokyo, Japan," is a national of a designated enemy country (Japan)

(R. 10). Respondent was—and is—a citizen of Japan and she was within Japan (R. 2–3, 6–7). To apply Section 39 to her property is not to hold, as respondent repeatedly urges (pp. 10, 11), that the function of that Section is "To retain * * * all property whether taken by mistake or not" (Brief p. 20; see also pp. 10, 11). There was no mistake in this case.

Second, respondent's construction of Section 39 is untenable. She asserts that the subject of the section is the net proceeds remaining after completion of administration, etc., of German and Japanese property, and that the section thus prohibits only the return of the proceeds remaining after completion of proceedings otherwise authorized under Section 9 (a) and other provisions of the Act (Brief, pp. 10, 18–23). To support this argument, she is forced to resort to an astonishing inversion of the statutory language (Brief 18). Section 39 contains three sentences (Petitioner's Brief, Appendix p. 64). It is the first sentence which specifies what property shall not be returned. That sentence provides that "No property * * * of Germany, Japan, or any national thereof * * * shall be returned." The second sentence deals with a wholly different matter—the administrative duty of the Custodian to cover certain funds into the Treasury. It provides that the net proceeds "of any *such* prop-

erty or interest"—i. e., the property whose return is prohibited by the first sentence—shall be covered into the Treasury. [Emphasis added.] Thus, the prohibition against return applies to all "property" of German and Japanese nationals; it cannot be read as applying only to the "proceeds" of such property. And, as more fully developed in our main brief (pp. 25–30), in thus prohibiting the return of German and Japanese vested property, Congress was fully aware that the effect of the section would be to extend the statutory definition of "enemy" in Section 2 to include German and Japanese nationals even though not resident in enemy territory.

In seeking further support of her position that the fund to be used for the payment of war claims was to consist merely of such property as was not returnable under Section 9 (a) of the Act as it existed prior to the addition of Section 39, respondent refers to statements of government witnesses before the House Committee that German and Japanese vested property should be covered into the Treasury after administration and disposition of such property was completed in accordance with existing law. (Respondent's Brief, pp. 27–29.) Respondent concludes that since under the law, as it then existed, returns under Section 9 (a) were per-

mitted to a national of Japan not resident there, the net proceeds referred to by government witnesses meant the proceeds remaining after such returns. Respondent's conclusion is based on an erroneous assumption. In March, 1947, when the government witnesses testified, it was the government's position that a national of any foreign country was not eligible to sue under Section 9 (a) for the recovery of vested property. See *Clark* v. *Uebersee Finanz-Korp. A. G.*, 332 U. S. 480, 486–487 (decided December 8, 1947).[1]

In any event, these general statements, and others to which respondent refers, were not addressed to the problem with which this case deals. As we have pointed out in our main brief (pp. 26–28), when attention was explicitly focused on that problem at the Senate hearings, the Senate subcommittee clearly understood that the effect of the bill would be to bar returns

[1] See also, the testimony of Mr. Cutler and of Mr. Isenbergh, both of the Office of Alien Property, *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Congress, 2d Session, on S. 2378 and S. 2039;* also the testimony of Mr. Markham, then Alien Property Custodian, reported in *Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Congress, 2d Session, on H. R. 5089, p. 6.*

(except under Section 32) to German and Japanese nationals wherever resident and refused to adopt proposed amendments to change that result.[2]

Respectfully submitted.

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[2] Respondent again misunderstands the Government's position when she states that petitioner argues that Public Resolution No. 8 of 1921 barred suits by German nationals under Section 9 (a) (Brief, pp. 32–33). What petitioner contends is that the Treaty of Berlin barred suits by German nationals "wherever resident" (Petitioner's Brief, pp. 17–18). The cases cited on page 18 of petitioner's brief rely on the Treaty, not on the Resolution.

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No. 10005

In the United States Court of Appeals for the Seventh Circuit

SHINSAKU NAGANO, PLAINTIFF-APPELLANT

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Honorable WILLIAM J. CAMPBELL, District Judge

DEFENDANT-APPELLEE'S PETITION FOR REHEARING

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Honorable WILLIAM J. CAMPBELL, District Judge

DEFENDANT-APPELLEE'S PETITION FOR REHEARING

On February 26, 1951, this Court reversed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and remanded the cause with directions to enter judgment for plaintiff for recovery of 3,105 shares of stock of the Fuji Trading Company.

In accordance with Rule 22 of this Court, defendant-appellee files this Petition for Rehearing on the following grounds:

1. *There is an issue which has not been disposed of.*

At the trial in the District Court the defendant in-

troduced evidence in support of alternative contentions with respect to said 3,105 shares tending to show:

(a) That plaintiff had made a gift to his wife of the shares;

(b) That plaintiff's wife was legally entitled, on the basis of consideration paid by her, to the shares.

The District Court held that plaintiff was not entitled to recover because in 1932 he made a gift of said shares to his wife (R. 141–142). Accordingly, it found it unnecessary to decide defendant's alternative contention that plaintiff's wife was in any event entitled to substantially all the shares by right of purchase (R. 145). It made no findings with respect to the issue raised by that contention.

This Court held that there was not a sufficient delivery of the shares by the plaintiff to his wife to constitute an effective gift, reversed the judgment of the trial court and remanded the cause with directions to enter judgment for the plaintiff. In so doing this Court failed to pass upon the issue raised by defendant's alternative contention, "(b)", *supra*, although that contention was argued by defendant in his Brief in this Court. Defendant's Brief, pp. 29–32. As we have indicated, the District Court did not make findings on that issue, which depended in substantial part on the credibility of plaintiff's testimony. Since the plaintiff may not recover in this action property which belonged to his wife as of the date of vesting it is submitted that the direction to enter judgment for the plaintiff without disposing of the issue raised by defendant's alternative contention was erroneous.

2. *Section 39 of the Trading With the Enemy Act prohibits recovery by the plaintiff.*

This action was tried in the District Court before the enactment in 1948 of Section 39. Plaintiff's counsel stated, however, at the argument before this Court, that if the position of the defendant in the companion case of *Kaku Nagano* v. *McGrath*, No. 10192, with respect to the application of Section 39, were upheld, it would apply equally in this action. This statement accords with the holdings in District Courts in other Circuits. *Schill* v. *McGrath*, 89 F. Supp. 339 (S. D. N. Y.), and *Gussefeldt* v. *McGrath*, 89 F. Supp. 344 (D. C. D. C.), and the unreported cases cited in defendant's brief in No. 10192. The opinion of this Court in this action, however, did not pass upon the application of Section 39.

Plaintiff is a citizen of Japan and as such, a "national" of Japan within the Act. Executive Order 8389, as amended, Section 5E (i) (5 F. R. 1400). The definition of "national" in the Executive Order was twice ratified by the Congress. Joint Resolution of May 7, 1940, 54 Stat. 179; Section 302, First War Powers Act, 55 Stat. 840. According to the authorities referred to *supra* citizenship of Germany or Japan is in itself sufficient to bar a recovery under Section 9 (a) of the Trading With the Enemy Act.

Wherefore, defendant respectfully prays:

(1) That a rehearing be granted, or,

(2) That the opinion and mandate of this Court be amended to direct a new trial or that the District Court make appropriate findings with respect to de-

fendant's alternative contention that plaintiff's wife was entitled to the shares in question by virtue of having paid for them, or,

(3) For such other and further relief as to the Court may seem meet and proper.

Respectfully submitted.

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